No. 83-1121

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL F. GRAY, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Page

Statute:

Miscellaneous:

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Petitioner challenges the determination that his plea of guilty to criminal tax fraud collaterally estops him from denying that his underpayment of tax for the years in question was "due to fraud" for purposes of the civil fraud penalty. The decision below is correct, does not conflict with that of any other circuit, and does not warrant review by this Court.

1. Petitioner was indicted in 1975 on three counts of willfully attempting to evade income taxes for 1968-1970, in violation of Section 7201 of the Code.[1] Pursuant to a plea agreement, petitioner offered to plead guilty to all three counts (Pet. App. A26, A36-A38). A hearing was held in the United States District Court for the Eastern District of

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

Tennessee, at which petitioner admitted that he had filed false tax returns for 1968-1970 and had done so with the intent to evade tax (*id.* at A38-A40). The Assistant United States Attorney represented that the plea agreement involved "disposition of * * * the criminal case alone [and made] no disposition of [petitioner's] civil tax liability" (*id.* at A43). Petitioner and his counsel agreed with that representation (*id.* at A43-A44). The district court accepted petitioner's guilty plea, approved the plea bargain, and entered a judgment of conviction (*id.* at A26, A43-A48). Petitioner was sentenced accordingly and has complied with the terms of his sentence (*id.* at A26).

In April 1976, after the criminal proceedings were over, the Commissioner sent petitioner a notice of deficiency for 1968-1970, asserting deficiencies in income tax and civil fraud penalties under Section 6653(b) for those years (Pet. App. A2).[2] Petitioner sought redetermination in the Tax Court. It sustained the deficiencies and fraud penalties, holding in the latter respect that petitioner's guilty plea collaterally estopped him from denying that his underpayments of tax were "due to fraud" within the meaning of Section 6653(b) (Pet. App. A19, A24).[3]

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[2]Section 6653(b) imposes an "addition to the tax," commonly referred to as a penalty, "[i]f any part of any underpayment * * * of tax required to be shown on a return is due to fraud." The penalty is "an amount equal to 50 percent of the underpayment" (*ibid.*).

[3]After the Tax Court granted the Commissioner's motion for partial summary judgment on the question of fraud, petitioner sought a writ coram nobis from the district court, seeking to set aside his tax evasion conviction on the theory that the IRS had breached the plea agreement by sending him a notice of deficiency and by "using the doctrine of collateral estoppel to preclude [his] denial of [civil fraud] liability" (Pet. App. A33). The district court denied his motion (*id.* at A33-A34), and the Sixth Circuit affirmed, holding that the preclusive effect of a guilty plea in a subsequent civil tax proceeding is not a "direct consequence" of the plea of which a defendant must be advised (*id.* at A27-A28), and finding no evidence that the prosecutor had "misled [petitioner] with respect to the separate issue of civil [tax] liability" (*id.* at A28). This Court denied certiorari. *Gray* v. *United States*, 454 U.S. 1143 (1982).

The court of appeals affirmed the Tax Court, one judge dissenting (Pet. App. A1-A15).[4] The majority noted that petitioner's guilty plea resulted in "a forthright judicial determination * * * that he was guilty [of tax fraud]" and that his judgment of conviction thus constituted "an adjudication on the merits of the fraud issue" (*id.* at A5, A6). It accordingly held that his plea of guilty "conclusively establishe[d] fraud in [the] subsequent civil tax fraud proceeding through application of the doctrine of collateral estoppel," noting that this holding accorded with that of every other circuit that has considered the question (*id.* at A7 (citing cases)). The dissenting judge believed that collateral estoppel should not apply, expressing the view that petitioner's conviction upon plea of guilty did not constitute an "actual adjudication" of fraud and that, even if it did, the plea bargain procedure did not afford petitioner a "full and fair opportunity" to litigate it (*id.* at A10).

2. The courts below correctly held that petitioner was collaterally estopped from relitigating the issue of fraud. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits * * * involving a party to the prior litigation," provided that such party has had a "full and fair opportunity" to litigate the matter in the earlier case. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Accord, *e.g.*, *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 4; *Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980). Here, the district court that convicted petitioner of tax evasion for 1968-1970 "actually and necessarily determined" that at least part of his underpayment of tax for those years was "due to fraud" within the meaning of Section 6653(b), since "[t]he constituent elements of criminal tax evasion and of civil tax fraud

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[4]The opinion of the court of appeals is reported at 708 F.2d 243.

are identical." *Hicks Co.* v. *Commissioner*, 470 F.2d 87, 90 (1st Cir. 1972); *Moore* v. *Commissioner*, 360 F.2d 353, 356 (4th Cir. 1965). See *Tomlinson* v. *Lefkowitz*, 334 F.2d 262, 265 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965). Petitioner, moreover, plainly had a "full and fair opportunity" to litigate the issue of fraud in connection with his plea agreement, since, as the court of appeals noted (Pet. App. A6-A7), he was fully examined about his understanding of the charges contained in the indictment and voluntarily admitted that he had filed false returns for 1968-1970 with the intent to evade tax.

In holding that collateral estoppel applied in these circumstances, the Sixth Circuit below followed the decisions of every other circuit that has considered the question. The courts of appeals have uniformly held that a conviction for tax evasion by filing false returns under Section 7201, whether upon a plea of guilty or a jury verdict after a trial, conclusively establishes fraud in a subsequent civil tax proceeding by virtue of collateral estoppel. *Fontneau* v. *United States*, 654 F.2d 8, 10 (1st Cir. 1981) (guilty plea); *Plunkett* v. *Commissioner*, 465 F.2d 299, 305-307 (7th Cir. 1972) (guilty plea); *Neaderland* v. *Commissioner*, 424 F.2d 639, 642 (2d Cir.), cert. denied, 400 U.S. 827 (1970) (conviction following trial); *Moore*, 360 F.2d at 355-356 (conviction following trial); *Armstrong* v. *United States*, 354 F.2d 274, 291 (Ct. Cl. 1965) (conviction following trial); *Tomlinson*, 334 F.2d at 265 (conviction following trial); *Arctic Ice Cream Co.* v. *Commissioner*, 43 T.C. 68, 75 (1964) (guilty plea). Cf. *Considine* v. *United States*, 683 F.2d 1285, 1287 (9th Cir. 1982) (conviction for willfully filing false returns under Section 7206(1) collaterally estops taxpayer from contesting falsity in subsequent civil proceeding).[5]

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[5]Contrary to petitioner's contention (Pet. 16-17), *Kreps* v. *Commissioner*, 351 F.2d 1 (2d Cir. 1965), does not conflict either with the cases cited above or with the decision below. The Second Circuit there found

3. Petitioner's reliance (Pet. 8-9) on *United States* v. *International Building Co.*, 345 U.S. 502 (1953), is misplaced. In that case, which involved the preclusive effect of a prior Tax Court proceeding, this Court reiterated that estoppel by judgment presupposes an "adjudication of the merits," *i.e.*, a situation in which an issue has been "actually presented and determined in an earlier suit." 345 U.S. at 506. The Court noted that the issue in question there, having been abandoned by joint stipulation of the parties, had not actually been adjudicated by the Tax Court, and this Court accordingly held that res judicata did not apply. 345 U.S. at 506. Here, by contrast, the issue of fraud was plainly "presented to" the district court and "adjudicated on the merits," since petitioner was convicted of tax evasion after being fully advised of the elements of the crime charged, of the nature of the evidence the government was prepared to

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it "unnecessary to consider" the taxpayer's contention that his guilty plea should not be accorded preclusive effect, noting that his plea at least constituted admissible evidence and that the evidence as a whole established fraud. 351 F.2d at 6. As petitioner observes (Pet. 11-12), some commentators have expressed reservations, on policy grounds, about the desirability of according preclusive effect to criminal convictions based on guilty pleas. See Wright, Miller & Cooper, *Federal Practice and Procedure* § 4474, at 759-760 (1981); 1B Moore, Lucas & Currier, *Moore's Federal Practice* para. 0.418[1], at 558-559 (2d ed. 1983). Those commentators, however, do not discuss the issue in the federal income tax context, and in any event are frank to admit that their reservations have not been shared by the federal appellate courts. See 1B Moore, Lucas & Currier, *supra*, para. 0.418[1], at 557 (footnote omitted) (noting that "the generally accepted rule is that a judgment of conviction, based on a plea of guilty, is conclusive in a civil suit between the same parties of all the issues that would have been determined by a conviction after a contested trial"); Wright, Miller & Cooper, *supra*, § 4474, at 760 (footnotes omitted) (noting that "many decisions use guilty pleas to establish issue preclusion both in subsequent civil litigation with the government and in subsequent private litigation").

present, and of the direct consequences of his guilty plea (Pet. App. A42-A48).[6]

At bottom, petitioner's objection seems to be (see Pet. 14) that he was unaware of the collateral tax consequences of his guilty plea at the time he entered it. But petitioner's awareness of such collateral effects would be relevant, if at all, only in determining whether his plea was "voluntary." As noted above (see page 2 note 2, *supra*), the court of appeals previously determined that petitioner's guilty plea "conform[ed] to the constitutional standards of voluntariness," holding that collateral civil tax effects were not a "direct consequence" of his plea of which he had to be explicitly informed (Pet. App. A27). This Court has already denied certiorari (454 U.S. 1143) on that question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

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[6]Petitioner's reliance (Pet. 16-17) on *Adolph Coors Co.* v. *Commissioner*, 519 F.2d 1280 (10th Cir. 1975), is similarly misplaced. That case had nothing to with the collateral estoppel effect of a prior criminal conviction. Like *International Building Co.*, it held only that collateral estoppel does not apply where an issue has been raised in a prior civil proceeding, but has been abandoned by the party raising it and thus not adjudicated on the merits. 519 F.2d at 1283.

DOJ-1984-03